Supreme Court, U.S.
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No. 04-533

In The

# Supreme Court of the United States

JOEFFRE KOLOSKY,

*Petitioner,*

v.

FAIRVIEW UNIVERSITY MEDICAL CENTER,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI

JOEFFRE KOLOSKY
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*Pro Se Petitioner*

## QUESTIONS PRESENTED

1. Did the United States Court of Appeals err in concluding that Dismissal of Kolosky's Complaint was proper?

2. To determine question #1, Did the United States Court of Appeals IGNORE my mental state of mind, Federal Regulations Part 825, Federal Statute, Minnesota Statute and the Collective Bargaining Agreement (CBA), and precedent as in the case of *Debbie Stekloff v. St. John's Mercy Health Systems*, cited as 218 F.3d 858 (8th Cir. 2000)?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Citations of Official {Unpublished} Report | 1 |
| Jurisdiction | 1 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement of the Case | 6 |
| Argument | 10 |
| Conclusion | 17 |

# TABLE OF AUTHORITIES

Page

CASES

*Debbie Stekloff v. St. John's Mercy,* 218 F.3d 858 (8th Cir. 2000) ..... 10, 14, 17

*Taylor v. Numock's Oil Co.,* 214 F.3d 957 (8th Cir. 2000) ..... 15

FEDERAL STATUTES

28 U.S.C. 1254(1) ..... 1

29 U.S.C. 2601, et seq. ..... 1

29 U.S.C. 2601(a)(1) ..... 1

29 U.S.C. 2601(b)(2), (3) ..... 3

29 U.S.C. 2611(2)(a) ..... 2, 11

29 U.S.C. 2612(a)(1)(d) ..... 2, 3

29 U.S.C. 2615(a)(1) ..... 2, 12

Minnesota Statute Notice of Injury
Minn. Stat. 176.141 ..... 4, 5, 12

Code of Federal Regulations 825
C.F.R. 825.101(c) ..... 16

C.F.R. 825.303(b) ..... 3

C.F.R. 825.304 ..... 4

C.F.R. 825.700 ..... 3

C.F.R. 825.702(a) ..... 4

TABLE OF AUTHORITIES – Continued

Page

Rules of the Supreme Court
Rule 10(a) ..... 10

Rule 14(h) ..... 10

Collective Bargaining Agreement
Section 4(A) ..... 5

## CITATIONS OF OFFICIAL {UNPUBLISHED} REPORT

The United States Court of Appeals For the Eighth Circuit, for Case No. 03-3581, Joeffre Kolosky, Appellant v. Fairview University Medical Center, Appellee, Filed May 17, 2004. Before MORRIS SHEPPARD ARNOLD, FAGG, and SMITH, Circuit Judges.

PER CURIAM.

Joeffre Kolosky appeals the District Court's Dismissal of Kolosky's civil complaint brought under the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601, et seq. We conclude the Dismissal of Kolosky's complaint was proper because he ceased to be eligible for FMLA benefits under 29 U.S.C. 2601(a)(1) when his employment with Fairview University Medical Center was terminated, and he did not provide Fairview adequate notice before his termination that he needed FMLA leave. We affirm the judgement of the District Court. See 8th Cir. R. 47B.

## JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit decided my case was May 17, 2004.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date, June 17, 2004.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Federal Statutes

1. (a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

. . .

(d) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. 2612(a)(1)(d)

Further, the FMLA defines "eligible employee" as follows:

The term "eligible employee" means an employee who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12 month period.

29 U.S.C. 2611(2)(a)

2. "It shall be unlawful for an employer to interfere with, restrain, or DENY the exercise of or the attempt to exercise, any right provided under the FMLA." 29 U.S.C. 2615(a)(1)

3. "Concept of a serious health condition," under FMLA was meant to be broad, and the FMLA provisions

should be interpreted to effect its remedial purpose. FMLA 1993, 2 et seq., 29 U.S.C.A. 2601 et seq.

4. The text of the FMLA reveals that its purpose is to "entitle employees to take reasonable leave for medical purposes," but only "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. 2601(b)(2), (3)

5. A demonstration that an employee is unable to work in his or her current job due to a serious health condition is enough to show that the employee is incapacitated for purposes of the FMLA, even if that job is the only one that the employee is unable to perform. FMLA of 1993, 2 et seq., 29 U.S.C.A. 2601 et seq.

6. The inquiry into whether an employee is able to perform the essential functions of her job, within meaning of the FMLA, should focus on his/her ability to perform those functions in his/her current environment. FMLA 102(a)(1)(D), 29 U.S.C.A. 2612(a)(1)(d).

## CODE OF FEDERAL REGULATIONS PART 825

1. Nothing in the FMLA diminishes an employer's obligation under a CBA or employment benefit program or plan to provide greater FMLA rights to employees than rights established under FMLA. C.F.R. 825.700 (page 74).

2. The employee need not expressly assert rights under the FMLA, or even Mention the FMLA, but only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation. C.F.R. 825.303(b) (page 119).

3. Four of the commenters urged that an employer not be permitted to deny leave under any circumstances when the employee fails to provide adequate notice, but only delay the leave. They questioned the extent of an employer's right to take disciplinary action in the event adequate notice is not provided and urged that the employer be prohibited from denying leave or discharging the employee for inadequate notice. The regulation is revised to provide that an employer may delay (rather than deny) leave where required notice has not been given. C.F.R. 825.304 (pages 61, 62).

4. The purpose of the FMLA is to make leave available to eligible Employees and employers within its coverage, and not to limit already existing rights and protections. S. Rep. No. 3 103d Cong., 1st sess. 38 (1993) (page 130 C.F.R.).

5. An employer must therefor provide leave under whichever Statutory Provision provides the greater rights to employees. C.F.R. 825.702(a) (page 130).

## MINNESOTA STATUTES

1. Minnesota Statute 176.141 Notice of Injury.

   Unless the employer has actual knowledge of the occurrence of the injury or unless the injured worker, or a dependant or someone in behalf of either, gives written notice thereof to the employer within 14 days after the occurrence of the injury, then no compensation shall be due until notice is given or knowledge obtained. If the notice is given or the knowledge obtained within 30 days from the occurrence of the injury, no want, failure, or inaccuracy of notice shall be a bar to obtaining compensation unless the employer shows prejudice by such want, defect, or inaccuracy, and then only to the extent of the prejudice. If the notice is given or the knowledge obtained within 180

days, and if the employee or other beneficiary shows that failure to give notice was due to the employee's mistake, inadvertence ignorance of fact or law, or inability, or to the fraud, misrepresentation, or deceit of the employer or agent, then compensation shall be allowed. . . . Minnesota Statute 176.141 Notice of Injury (known as Exhibit #32)

## COLLECTIVE BARGAINING AGREEMENT (CBA)

1. Section 4 Unpaid Leaves of Absence.

   A. Employee Medical Leave A leave of absence without pay shall be granted to an employee in the case of illness or physical disability, rendering the employee unable to work as certified by a Doctor, which exhausts accumulated time off. Such leave shall be for the period of illness or disability only, up to a maximum of one (1) year. An employee must either be authorized forty (40) hours or more per pay period or have worked for the employer (12) months and a minimum of 1,250 hours in the preceding (12) months in order to be eligible. The leave terminates after expiration of the one (1) year or upon certification by a Doctor of recovery from such illness or disability, whichever occurs first. The employer reserves the right to request proof of illness and/or to require a medical exam paid for by the Employer by a Doctor of the employer's choosing.

Agreement between Fairview University Medical Center and Local 1164 AFSCME Council 6 AFL-CIO August 1, 1998 through July 31, 2001 (Known as Exhibit #30)

## STATEMENT OF THE CASE

This case is about this Appellant being discriminated from taking medical leave due to a serious injury, (illness), that came about from working an excessive amount of overtime hours for the employer. I had worked OVER 350 hours of overtime from October 1999 to January 20, 2000. This was due to the fact that the employer did not have adequate help in a time of need. I was called in at all hours of the day and night to meet the needs of the employer. I was told by the employer not to do the extra work on January 20, 2000. On January 21, 2000 I reported to Human Resources that "I was totally burned out and sick." On January 27, 2000, I had a mental breakdown, or an episode of decompensation, demonstrated by a loss of adaptive functioning (uncontrolled behavior). I informed the employer on January 27, 28, 2000 that I was exhausted and sick. On January 28, 2000 I was terminated from employment. I went to the Doctor and complained of an increase in anger and that I had an angry outburst. On January 31, 2000 I called the employer and told them that I had been to the Doctor and that I was stressed. In a situation like this, calling in and letting the employer know that you are sick is all that it takes to use the sick leave benefits you have earned. I was denied this practice. My mental health deteriorated, and I went back to the Doctor and was referred to a Psychiatrist. I was on a wrong medication and started to be treated and finally weaned from the wrong medication and put on a new one. I had my Doctor write out a note that stated: "Joeffre Kolosky has been a patient of our clinic for the past 4 years. He has been on medication and receiving treatment for depression and anxiety. Recently his symptoms became much worse and as of Friday, January 28, 2000 has been

unable to work due to exacerbation of his symptoms and possibly some interactions of his medications. We have been following Mr. Kolosky in our office, as well as referrals to outside sources and he is unable to work until the current situation has been stabilized." Signed Peggy Kibira, Riverside Family Physicians. Dated February 21, 2000. (this was known as exhibit #5) This was sent with an incident report, (known as Exhibit #6) written by me that stated "in the pursuance of furthering Fairviews business interests, I became physically and mentally exhausted (stress), and this stress caused an exacerbation of a previous and current medical condition." This along with the Doctors order not to work was sent to the employer via U.S. mail, on February 25, 2000. (I was not allowed to be at the work site due to a trespass order). The employer copied me, on March 2, 2000 (known as Exhibit #7) that they had received the report and Doctors order. On March 11, 2000 I received in the mail a letter (known as Exhibit #34 pages 1, 2) stating "the employer denies the employee suffers from any mental decompensation causing disability," the employer denies the alleged stress at work caused, aggravated, accelerated, or exasperated any physical symptoms." "I have received your note with the attached doctor's notes. After reading them I am maintaining my denial of our claim." That was signed Sharon Holeman on behalf of the employer. I appealed, this decision many times and was denied. I continued to communicate with the employer all issues about my health by sending them additional Doctors orders not to work. (known as Exhibits 8, 9, 10, 11) I was continually denied to be on medical leave. I continued to have mental and physical health issues. All were reported to the employer. Please note that the employer made their determination and decision without sending me to their Doctor, or conferring with my Doctor.

Sharon Holeman, the person who denied leave was not a medically trained person. They knew about my medical condition (injury) situation on January 21, 27, 28, 31, 2000 when I reported to them that I was "totally burned out and sick as a result of working 350 hours of overtime."

I had an extensive review of my health by the Social Security Administration, of which they reviewed my medical file and sent me to their Doctor for an exam. This is what William S. Herbert, Administrative Law Judge for SSDI opined on August 6, 2002.

> "Mr. Kolosky has had treatment for mental conditions prior to his onset. These early reports indicate depression with possible schizoid or paranoid reaction. In January of 2000 the claimant reported increased depression and anger to his doctor. I find one or two episodes of decompensation. An episode of decompensation is an exacerbation or temporary increase in symptoms or signs accompanied by a loss of adaptive functioning, as manifested by difficulties in performing activities of daily living, or maintaining social relationships, or maintaining concentration, or persistence or pace. Episodes of decompensation may be demonstrated by an exacerbation in symptoms or signs that would ordinarily require increased treatment or a less stressful situation. Episodes may be inferred from medical records showing significant alteration in medication, or a need for more structured psychological support system (e.g., hospitalization); or other relevant information in the record about the existence, severity and duration of the episode. Though the claimant was not hospitalized, the evidence indicates the claimant's condition worsened in January 2000 and possibly

again in 2002 leading to treatment or medication change."

For the record, I was hospitalized in October 2003 for paranoia, this was noted in Appellants Reply brief (Exhibits 45, 46, 47). My current Psychiatrist Dr. William Callahan, has given the diagnosis of Schizo-affective disorder, which has symptoms of paranoid thoughts and manic behavior. "Symptoms consistent with an affective disorder include sleep disturbance, anxiety or agitation, feelings of guilt or worthlessness, and difficulties in concentration." "A personality disorder has symptoms which include paranoid thoughts, inappropriate suspiciousness, and persistent disturbances of mood or affect." The employer described my condition on January 28, 2000 as "extremely hyper-sensitive with an irrational suspicion and distrust of others, along with many examples of paranoid thinking" (such as Mr. Kolosky's belief that he was being watched and stalked by certain individuals) (Exhibit #4 of Appellants brief). The Decision of the SSDI report was fully favorable to me. He is quoted from page 9 of the report: "It is the decision of the Administrative Law Judge that, based on the application filed on March 15, 2001, the claimant has been "disabled" since January 28, 2000." January 28, 2000 was my last day of employment.

I have said all the above to show that the employer denied I was ill, and denied requested time off without sending me to a Doctor for an evaluation, or consulting with my Doctor. Yet they knew I was sick, because they described my condition by stating "he has demonstrated an extreme degree of hyper-sensitivity with an irrational suspicion and distrust of others and gave many examples of paranoid behavior." They have purposely lied to me and denied me medical leave.

This complaint was originated in the 4th Judicial District of the State of Minnesota. The Respondent moved the Case to the United States District Court. The case was heard by the Honorable Magistrate Judge Susan Richard Nelson. Her Report and Recommendation was delivered on June 23, 2003. The Honorable Judge Donovan W. Frank delivered his Order on August 14, 2003. The United States Court of Appeals granted an extension to the Respondent to have their brief filed by January 9, 2004. The United States Court of Appeals delivered their Opinion on May 17, 2004. The United States Court of Appeals denied a timely petition for rehearing on June 17, 2004.

## ARGUMENT

Pursuant to Rule 14 of the Rules of the Supreme Court at (h), which states that I give a direct and concise argument amplifying the reasons relied on for allowance of the writ. Pursuant to Rule 10, Considerations Governing review on Certiorari "A petition for a writ of certiorari will be granted only for compelling reasons." From Rule 10, at (a) The United States Court of Appeals, for the Eighth Circuit has enter a decision in conflict with the decision of another case in the eight circuit.

I have given an overview of what transpired during the last three months of my employment, I had worked over 350 hours of overtime and became injured and sick. I was not fully cognizant of my surroundings, how could I be expected to act rationally? Yet I was denied all of the privileges of employment, by being terminated. In the case of *Debbie Stekloff v. St. John's Mercy,* 218 F.3d 858 (8th Cir. 2000) the Court stated "Concept of a 'serious health

condition' under FMLA was meant to be broad, and the FMLA provisions should be interpreted to effect its remedial purpose." "There is no requirement that employee be diagnosed with a serious health condition before becoming eligible for FMLA leave." "The FMLA definition of a serious health condition includes mental conditions." "We believe that Ms. Stekloff presented more than enough evidence to allow a reasonable jury to find she was unable to work in her job at St. John's for a period of three consecutive days." "As a matter of common sense, moreover, it seems to us that an employee who falls and breaks a leg while on the job should not be required to attempt to keep working." "(And be subject to termination for failure to do so or even for failure to perform some tasks up to standard) until a Doctor arrives and excuses her." In my case, I was sick, they knew it and yet they defied my Doctors order not to work, and denied my request for medical leave without sending me to their Doctor which is a built in protection for them according to the CBA.

I want to review the relevant laws involved as mentioned in the Statutory provisions.

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**FEDERAL STATUTE**

1. At 29 U.S.C. 2611(2)(a), the FMLA defines "eligible employee" "an employee who HAS BEEN employed. (i) For at least 12 months by the employer with respect to whom leave is requested under 2612 of this title; and (ii) For at least 1250 hours of service with such employer during the pervious 12 month period. (emphasis added) I had been employed for 23 years, and had worked over 2500 hours the previous year. Yet the U.S. Court of Appeals said I was not eligible.

At 29 U.S.C. 2615(a)(1) "It shall be unlawful for an employer to interfere with, restrain, or DENY the exercise or attempt to exercise any right provided under the FMLA." (emphasis added) In order for someone to exercise rights under FMLA, he/she has to be "able" to do it. Somehow in my situation, I was given 30 seconds to make a decision. I had been employed for 23 years. Nobody at my place of employment is put under intense pressure to ask for time off. Nor should anyone be pressured to do so.

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**MINNESOTA STATUTE**

2. Minnesota Statute 176.141 Notice of Injury (known as Exhibit 32), As mentioned in the Statutory Provisions. In this Statute, if the employer has knowledge of the occurrence, of which I told my employer on January 21, 2000 that I was "totally burned out and sick," and again on January 27, 28, 31, 2000 that I was sick, then I have 30 days according to the Statute to get the proper incident report in along with a Doctor's order not to work. I filled out and sent to the employer the incident report (known as exhibit #6) and the Doctor's report (known as exhibit #5) on February 25, 2000. I was copied on March 3, 2000 that the employer had received my incident report. (known as Exhibit #7) They note on the First report of Injury, that the first day of lost time was January 31, 2000. So I had notified them of the injury on January 21, 27, 28, 31, verbally, and sent the form in by February 25, 2000 which was well within the 30 days allowed by Minnesota Statute 176.141.

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## COLLECTIVE BARGAINING AGREEMENT

3. At Section 4, Unpaid Leave of Absence A. Employee Medical Leave. (known as Exhibit #30, It says: "A leave of absence SHALL BE GRANTED (emphasis added) to an employee in the case of illness, or physical disability, rendering the employee unable to work as certified by a Doctor, which exhausts accumulated time off." "Such leave shall be for a maximum of one (1) year." "The employer reserves the right to request proof of illness and/or require a medical exam paid for by the employer by a Doctor of the employer's choosing." I only need to say that I was denied this CBA right, of which I paid dues for. FMLA does not diminish an employer's obligation from honoring the CBA.

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## FEDERAL REGULATIONS

A. Nothing in FMLA diminishes an employer's obligation under a CBA.

B. The employee need not expressly assert rights under FMLA, or even mention FMLA, but only state that leave is needed. (at my place of employment, only letting the employer know that you won't be in is all it takes to use earned sick time).

C. The regulation is revised to provide that an employer may delay (rather than deny) leave where required notice has not been given.

D. The purpose of FMLA is to make leave available to eligible employees and employers within its coverage and not limit already existing rights and protections.

E. An employer must therefor PROVIDE LEAVE UNDER WHICHEVER STATUTORY PROVISION PROVIDES the GREATER RIGHTS TO EMPLOYEES

> (emphasis added). As an addition to what already has been said, the FMLA Regulations brings the glue that holds all the Statutes and Provisions together. I have shown that this employer denied my requested time off for medical leave. I have shown that this employer violated State Statute. I notified the employer of my condition and provided the proper incident report and Doctors order not to work. I showed that the employer violated the CBA, which said medical leave "shall be granted." The employer also denied I suffered mental decompensation causing disability, without sending me to their Doctor. The SSDI Administrative Law Judge William Herbert said that I had suffered mental decompensation causing disability. He went through a very extensive review of all the record, yet the employer did not investigate my medical record or consult with my Doctor, and denied medical leave. The FMLA regulations say "when medical leave is sought by an employee the employer will be expected to obtain any additional required information."

THE CASE OF *DEBBIE STEKLOFF v. ST. JOHN'S MERCY,* cited as *Debbie Stekloff v. St. John's Mercy*, 218 F.3d 858 (8th Cir. 2000). The U.S. Court of Appeals for the Eighth Circuit gave this opinion in the *Stekloff* case.

> "We think that the key issue in this case is whether Ms. Stekloff's inability to work at St. John's is enough to show that she was unable to work for FMLA purposes and therefore was incapacitated within the meaning of the FMLA, or whether she must further show that she was unable to work in some other job other than her own. We are aware of the parallels between the issue before us and the inquiry that is made to determine whether plaintiff is disabled within the meaning of (ADA) of 1990. An ADA plaintiff must demonstrate that he or she is unable to

> perform "the major life activity of working" and is therefor disabled for purposes of the ADA. A plaintiff who shows only inability to perform his or her own job has not, therefore, made a showing of disability sufficient to entitle him or her to protections of the ADA. See *Taylor v. Numock's Oil Co.*, 214 F.3d 957, 960 (8th Cir. 2000).

Administrative Law Judge William S. Herbert made this determination:

"The specific issues are whether the claimant is under a disability, as defined in the Social Security Act, and, if so when such disability commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of the entitlement. After careful review of the evidence and testimony, I find the claimant disabled, within the meaning of the Act, at all times since January 28, 2000."

The key to Mr. Herbert's point made is that he said "after view of the evidence and testimony, I find the claimant disabled, within the meaning of the Act." I showed that Respondent (Fairview), when they made their determination "that they denied I suffered decompensation causing disability and denied time off. THEY DID NOT SEND ME TO THEIR DOCTOR. Mr. Herbert investigated all my health issues and consulted my Doctors and SSDI's Doctor and Social Worker. He said I was disabled since January 28, 2000. Sharon Holeman for the Respondent, made her determination without sending me to a Doctor, did not consult a Doctor. Yet she said "we deny he is sick," and denied time off. There is a very clear difference in how these two parties came to their determinations. Further review from Ms. Stekloff's case shows this:

> "Upon consideration of the declared purposes of the FMLA and its legislative history, we hold that a demonstration that an employee is unable to work in his/her current job due to a serious health condition is enough to show that the employee is incapacitated, even if that job is the only one that the employee is unable to perform." "In reaching this conclusion, we think it is important to understand that a motivating force behind the adoption of the FMLA was Congress's concern with the "inadequate job security for employees who have a serious health condition." 29 U.S.C. 2601(a)(4). The regulations emphasize the benefits of "stable workplace relationships," noting that "when workers can count on durable links to their workplace they are able to make their own full commitments to their jobs," see 29 C.F.R. 825.101(c). We therefore think that a desire to promote job security and stability in workplace relationships was central to Congress's Decision to pass the FMLA. The fact that the employee could find work elsewhere does nothing to mitigate the damage caused by a disruption in the working relationship already established between the employee, and his current employer. The Court concluded "there is no requirement in the statute that an employee be diagnosed with a serious health condition before becoming eligible for FMLA leave."

The U.S. Court of Appeals "vacated the District Court's grant of Summary Judgement (Motion to Dismiss), on Ms. Stekloff's claim and remanded it for further proceedings.

## CONCLUSION

I have reviewed all relevant Statutes (Federal and State), Language from the CBA, and specific regulations from the Code of Federal Regulations 825. I have also used precedent from the Case of *Debbie Stekloff v. St. John's Mercy*, which was heard in the Eighth Circuit (2000). The *Stekloff* case was REMANDED back to the lower court for further proceedings "not inconsistent with this opinion." Along with the argument presented and some of what my mental condition was. I truly believe that the Eighth Circuits opinion is in error, because of what has been discussed (infra). And that if I was mentally and physically ill enough as determined by Administrative Law Judge William Herbert to be eligible for SSDI benefits on January 28, 2000, then I should have been eligible for FMLA "rights" on January 28, 2000.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOEFFRE KOLOSKY

Date: Sept. 8, 2004

## INDEX TO PETITIONER'S APPENDIX


| | | |
|---|---|---|
| Appendix A. | The Honorable Morris Shepard Arnold, Fagg, and Smith, Circuit Court Judges of United States Court of Appeals UNPUBLISHED REPORT Filed May 17, 2004 | App. 1 |
| Appendix B. | The Honorable Susan Richard Nelson United States Magistrate Judge REPORT AND RECOMMENDATION | App. 3 |
| Appendix C. | The Honorable Donovan W. Frank Judge of United States District Court ORDER entered August 14, 2003 | App. 11 |
| | ORDER entered September 23, 2003 | App. 13 |
| Appendix D. | Michael Gans, Clerk United States Court of Appeals Case Number 03-3581 DENIAL OF PETITION FOR REHEARING Filed June 17, 2004 | App. 15 |

**United States Court of Appeals**

**FOR THE EIGHTH CIRCUIT**

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No. 03-3581

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| Joeffre Kolosky,<br>Appellant,<br>v.<br>Fairview University Medical Center,<br>Appellee. | * | Appeal from the United States District Court for the District of Minnesota.<br>[UNPUBLISHED] |

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Submitted: May 7, 2004

Filed: May 17, 2004

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Before MORRIS SHEPPARD ARNOLD, FAGG, and SMITH, Circuit Judges.

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PER CURIAM.

Joeffre Kolosky appeals the district court's* dismissal of Kolosky's civil complaint brought under the Family and Medical Leave Act (FMLA), 29 U.S.C.

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* The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota, adopting the report and recommendations of the Honorable Susan Richard Nelson, United States Magistrate Judge for the District of Minnesota.

§ 2601, *et seq.* We conclude the dismissal of Kolosky's complaint was proper because he ceased to be eligible for FMLA benefits under 29 U.S.C. § 2612(a)(1) when his employment with Fairview University Medial Center was terminated, and he did not provide Fairview adequate notice before his termination that he needed FMLA leave. We affirm the judgment of the district court. *See* 8th Cir. R. 47B.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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| **Joeffre Kolosky,** | **Civil No. 03-1085 (DWF/SRN)** |
| **Plaintiff,** | |
| **v.** | **REPORT AND RECOMMENDATION** |
| **Fairview University Medical Center,** | (Filed June 23, 2003) |
| **Defendant.** | |

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Joeffre Kolosky, Pro Se

Eric Riensche, Esq., on behalf of Defendant

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SUSAN RICHARD NELSON, United States Magistrate Judge

The above entitled matter came before the undersigned United States Magistrate Judge on Defendant's Motion to Dismiss (Doc. No. 2). This matter has been referred to the undersigned pursuant to 28 U.S.C. § 636 and Local Rule 72.1.

For the reasons set forth below, Defendant's motion should be granted.

## I. BACKGROUND

Plaintiff brings a claim for violation of his entitlement to take leave under the Family Medical Leave Act (FMLA). Plaintiff alleges that at the time of his termination he had been an employee of Defendant for 23 years. Plaintiff states that in January of 2000 he began feeling sick because he was overworked and was suffering from a

mental illness. On January 21, 27, and 28 of 2000, Plaintiff verbally told Defendant that he "was ill." On or about January 27, 2000, Plaintiff got into an argument with representatives of Defendant. The next day, on January 28, 2000, Defendant terminated Plaintiff's employment.

After being terminated, Plaintiff continued to correspond with Defendant. On January 31, 2000, Plaintiff left a voice mail with Defendant indicating that he was sick. Sometime between January 28, 2000, the date of his termination, and February 25, 2000, Plaintiff visited a doctor who told Plaintiff that he had a serious illness and should not work. Thereafter, on February 25, 2000, Plaintiff sent Defendant a letter (incident report) requesting leave or time off. Plaintiff admitted twice at the hearing on this motion, in his complaint, and in his memorandum in opposition that February 25, 2000 was the first time he requested leave or to take time off. (Compl. at 3) ("I notified them of my need to take time off and they knew of it on March 3, 2000 [because Plaintiff had sent a letter on February 25, 2003].."); (Pl.'s Mem. In Opp'n to Def.'s Mot. to Dismiss, at 5).

On or about December 12, 2001, an arbitrator conducted a hearing to determine whether Defendant properly terminated Plaintiff's employment on January 28, 2000. The arbitrator found that Defendant did properly terminate Plaintiff.

## II. DISCUSSION

When considering a motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6), "we must assume that all the facts alleged in the complaint are

true" and generally construe the complaint in the light most favorable to the plaintiff. *E.g.*, *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994). Although "the complaint must contain sufficient facts, as opposed to mere conclusions, to satisfy the legal requirements of the claim to avoid dismissal," *DuBois v. Ford Motor Credit Co.*, 276 F.3d 1019, 1022 (8th Cir. 2002), a court "may dismiss 'only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations.'" *E.g.*, *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995).

A review of the FMLA's statutory structure and provisions is in order. The FMLA provides:

> (a) In general
>
> (1) Entitlement to leave
>
> Subject to section 2613 of this title, *an eligible employee* shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> . . .
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1) (emphasis added).

Further, the FMLA defines "eligible employee" as follows:

> The term "eligible employee" means an *employee* who has been employed –

> (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and
>
> (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C. § 2611(2)(A) (emphasis added).

Finally, the FMLA states that the term "employee" shall "have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title." 29 U.S.C. §2611(3). Section 203(e) provides:

> [T]he term "employee" means *any individual employed by an employer.*[1]

(Emphasis added).

From the statutory provisions of the FMLA *and the nature of leave itself*, it is clear that only an individual currently employed by an employer can claim entitlement to leave from work under the FMLA.[2] *See, e.g., Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 451 (6th Cir. 1999) ("Because an employee cannot bring a claim under the FMLA unless he notifies his employer of his condition and requests relief during his employment, we hold that the district court properly concluded that

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[1] Since the defendant herein appears to be affiliated with the State of Minnesota, the definition of § 203(e)(C) may be applicable, which provides that the term "employee" means "any individual employed by a State."

[2] *Smith v. Bell South Telecomm.*, 273 F.3d 1303 (11th Cir. 2001) is not to the contrary as that case explained that the right to take FMLA leave "obviously cannot be exercised after the termination of an employment relationship." *Id.* at 1311.

Plaintiff could not establish a claim under the FMLA."). This conclusion is entirely sensible as a terminated employee has no job from which to take leave. Moreover, a contrary rule would foster feigning claims that would unnecessarily burden employers and the Courts.

It is undisputed that Plaintiff did not request leave or time off while he was currently employed[3] by Defendant – Plaintiff admits this in his complaint (Compl. at 2, 3) ("I notified them of my need to take time off and they knew of it on March 3, 2000."), in his memorandum (Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss, at 5) ("[Defendant] knew that I made a request for FMLA rights on February 25, 2000."), and twice at the hearing on this motion.[4] During the hearing on this motion the following exchange occurred:

> Court: Let me ask you this sir, when did you request FMLA leave?
>
> Plaintiff: I requested it on February 25, 2000.
>
> . . .
>
> Court: What concerns me here is your request was made, even by your own admission, after you were terminated.
>
> Plaintiff: Yes. There is no question that I was sick though.

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[3] As previously noted, Defendant terminated Plaintiff's employment on January 28, 2000.

[4] Accordingly, this is not a case where there is a fact issue concerning when or if the plaintiff gave sufficient notice of his/her request to take leave.

> Court: Right, but the request was not made you see, it sounds technical to you but under the law it seems to be fatal.
>
> Plaintiff: But even if, you know what, Your Honor, I worked there for 23 years, I certainly should have a couple of days to put my request in. You know, I mean I think they are being pretty hard on me if they are going to demand that I get it in like right now.

Thus, assuming all the allegations in Plaintiff's complaint are true, Plaintiff fails to state a claim upon which relief may be granted because at the time Plaintiff requested leave he was not currently employed by Defendant/an "employee" of Defendant, and, therefore, not an "eligible employee" for purposes of FMLA leave. *Brohm v. JH Properties, Inc.*, 149 F.3d 517, 523 (6th Cir. 1998). Accordingly, Plaintiff's complaint should be dismissed with prejudice.

Other courts that have addressed this particular issue have come to the same conclusion. For instance, in *Brohm*, a doctor alleged that the hospital violated the FMLA by refusing to provide leave and allowing him to return after treatment for sleep apnea. *Id.* "The district court summarily dismissed this claim on the basis that Brohm never requested leave during the time of his employment, that he was lawfully terminated, and that any treatment he received after being terminated was irrelevant because he was no longer an employee of the hospital." *Id.* In affirming the district court's ruling, the Sixth Circuit explained that "the statute affords a remedy only to eligible *employees*. Brohm was not an "eligible employee" at the time he received medical attention for his condition. He had already been terminated a week

earlier." *Id.* (citation omitted); *see also Dvorak v. Mostardi Platt Assoc. Inc.*, 289 F.3d 479, 486 (7th Cir. 2002) (stating, quite strongly in dicta, that "[t]o be eligible for FMLA benefits, one must at a minimum be an 'employee,' not a 'recently terminated employee.' A termination decision makes one ineligible for FMLA benefits. . . .") (citation omitted); *Smith v. Bell South Telecomm.*, 273 F.3d 1303, 1311 (11th Cir. 2001) (explaining that *Brohm* addressed "the right to take leave, *which obviously cannot be exercised after the termination of an employment relationship.*") (emphasis added); *Biermann v. Aluminum Co. of Am.*, 2000 WL 33362002, at *5 (S.D. Iowa Jan. 21, 2000) ("An employee cannot bring a claim under the FMLA unless he notifies his employer of his condition and requests relief during his employment."); *Weeden v. Sears Roebuck & Co.*, 1999 WL 970538, at *5 (D.N.H. Aug. 19, 1999) ("Once employment has been terminated, the terminated, employee is no longer eligible to request leave.").

The facts here are quite similar, if not identical in relevant part, to those in *Brohm*. Plaintiff admits that he did not request leave until after Defendant terminated his employment, and Plaintiff did not seek medical attention until after his termination. Plaintiff did not request leave or time off until almost one month after he was terminated. (Compl. at 2, 3); (Pl's Mem. in Opp'n to Def.'s Mot. to Dismiss, at 5).

Given the above dispositive holding, this Court need not address whether Plaintiff's claim is barred by the Statute of limitations.

Based upon the foregoing and all the files, records, and proceedings herein,

**IT IS HEREBY RECOMMENDED that:**

1. Defendant's Motion to Dismiss (Doc. No. 2) should be **GRANTED**. Plaintiff's complaint should be **DISMISSED WITH PREJUDICE**.

Dated: June 23, 2003

/s/ Susan Richard Nelson
SUSAN RICHARD NELSON
United States Magistrate Judge

Under D. Minn. LR 72.1(c)(2) any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties by July 6, 2003, a writing which specifically identifies those portions of this Report to which objections are made and the basis of those objections. Any party wising to oppose such objections must file and serve all parties with its response. Failure to comply with this procedure may operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Joeffre Kolosky,

Plaintiff,

v.

Fairview University Medical Center,

Defendant.

Civil No. 03-1085 (DWF/SRN)

**ORDER**

(Filed Aug. 14, 2003)

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Joeffre Kolosky, *Pro Se*, 7018 Brooklyn Boulevard, #7, Minneapolis, MN 55429-5542, Plaintiff.

Lee A. Lastovich, Esq., and Eric Riensche, Esq., Felhaber Larson Fenlon & Vogt, 225 South Sixth Street, Suite 4200, Minneapolis, MN 55402-4302, counsel for Defendant.

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This matter is before the Court upon Plaintiff's objections to Magistrate Judge Susan Richard Nelson's Report and Recommendation dated June 23, 2003.

The Court has conducted a *de novo* review of the record, including a review of the arguments and submissions of counsel, pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c).

Based upon the Court's *de novo* review of the record, the Court's review of the arguments and submissions of the parties, and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

**ORDER**

1. The Court **OVERRULES** the Plaintiff's objections (Doc. No. 13) and **ADOPTS** the Report and Recommendation of Magistrate Judge Susan Richard Nelson dated June 23, 2003 (Doc. No. 12).

2. Accordingly, Defendant's motion to dismiss (Doc. No. 2) is **GRANTED.** Plaintiff's complaint is **DISMISSED WITH PREJUDICE.**

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: August 14, 2003 /s/ Donovan W. Frank
DONOVAN W. FRANK
Judge of United States
District Court

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

Joeffre Kolosky,

Plaintiff,

v.

Fairview University Medical Center,

Defendant.

Civil No. 03-1085 (DWF/SRN)

**ORDER**

(Filed Sep. 23, 2003)

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Joeffre Kolosky, *Pro Se*, 7018 Brooklyn Blvd., #7, Minneapolis, MN 55429-5542.

Lee A. Lastovich, Esq., and Eric Riensche, Esq., Felhaber Larson Fenlon & Vogt, 225 S. Sixth St., Ste. 4200, Minneapolis, Minnesota 55402-4302, counsel for Defendant.

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## Introduction

The above-entitled matter is before the undersigned United States District Judge pursuant to Plaintiff Joeffre Kolosky's self-styled request for a Motion to Reconsider this Court's Order dated August 14, 2003, wherein the Court adopted the Report and Recommendation of Magistrate Judge Susan Richard Nelson dated June 23, 2003, and granted Defendant's Motion to Dismiss with Prejudice. In addition, Plaintiff has brought a self-styled Motion for a New Trial, which may be more properly characterized as a Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e). For the following reasons, Plaintiff's requests for reconsideration are denied.

## Discussion

In his various motions requesting the Court's reconsideration of this matter, Plaintiff suggests that the Court has misunderstood and/or disregarded his arguments regarding the Family Medical Leave Act. The Court has reevaluated Plaintiff's arguments and revisited Magistrate Judge Susan Richard Nelson's Report and Recommendation dated June 23, 2003. Regardless of whether the Court characterizes Plaintiff's motion as one for leave to request reconsideration pursuant to Local Rule 7.1(g), or as one for a new trial or to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59, the Court finds that Plaintiff's arguments do not merit reconsideration of this matter.

## Order

1. Plaintiff's Request for Reconsideration of Order Granting the Defendant Their Motion to Dismiss (Doc. Nos. 19 and 20) is **DENIED.**

2. Plaintiff's Motion for New Trial (Doc. No. 18) is **DENIED.**

Dated: September 23, 2003 /s/ Donovan W. Frank
DONOVAN W. FRANK
Judge of United States
District Court

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

No. 03-3581

| | | |
|---|---|---|
| Joeffre Kolosky, | * | |
| | * | |
| Appellant, | * | |
| | * | |
| vs. | * | Appeal from the United States District Court for the District of Minnesota. |
| | * | |
| Fairview University Medical Center, | * | |
| | * | |
| Appellee. | * | |

The petition for rehearing by the panel filed by Appellant Kolosky is denied.

(5193-010199)

June 17, 2004

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit